INTERNATIONAL ARBITRATION ON INVESTMENT DISPUTES IN NATURAL WEALTH AND RESOURCES SECTOR IN TANZANIA

Kennedy Gastorn, Hon. FAIADR[*]

Abstract

This article analyses rules relating to international arbitration in natural wealth and resources sector under the newly enacted Arbitration Act of 2020 of Tanzania. The Act is enacted to facilitate amicable settlement of disputes outside the court system as well as enforceability of arbitration agreements. In a broader framework, the Act responds to the challenges faced by Tanzania in managing and addressing many issues emerging in arbitration cases especially investor-state arbitration. Such reforms are not uniquely Tanzanian but form part of the larger emerging reforms in investment regime in key strategic economic sectors in most of the developing world. This is reflected within the ongoing UN Commission on International Trade Law (UNCITRAL) working group on reforming the investor-state dispute settlement system.

Under the new law, all disputes involving natural resources can only be arbitrated in Tanzania, as a seat of arbitration, whether under the auspices of the bodies established in Tanzania or otherwise. Likewise, all disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources can only be adjudicated in accordance with the laws of Tanzania. To this end, the Act complements similar relevant provisions under the Natural Wealth and Resources (Permanent Sovereignty) Act and the Natural Wealth and the Resources Contracts (Review and Re-

[*] The author is an Associate Professor of Law, Department of Public Law, University of Dar es Salaam; Advocate of the High Court of Tanzania, and Honorary Fellow, AIADR (Asian Institute of Alternative Dispute Resolution). Email: kennedy@udsm.ac.tz

Negotiation of Unconscionable Terms) Act of 2017. The Arbitration Act 2020 is aimed at creating a viable regime which will encourage alternative dispute resolution and establish a conducive framework for the enforcement of arbitral award.

This paper analyses the Arbitration Act 2020 whether it complies with the best international practices in arbitration regime. It also argues that limiting seat of arbitration and the governing law of international arbitrations on disputes in natural wealth and resources sector are significant reforms to the existing investments landscape in the sector in Tanzania. They form a part of the larger picture of emerging reforms in investment regime in key strategic economic sectors in most of the developing world. As a capital importing state, Tanzania, like other developing nations, seek to avoid the perceived frustrations of international arbitrations to obtain a fair deal on investment agreements on her natural resources through an effective arbitration regime and foreign investments. Indeed, these reforms are likely going to bring back many Tanzanian cases from abroad to Tanzania as a safe seat of arbitration.

Key words: International arbitration, seat of arbitration, governing laws, natural wealth and resources sector, Bilateral Investment Treaties (BITs).

1. INTRODUCTION

Developing countries' state practices on international arbitrations on disputes in natural wealth and resources sector is among fascinating reforms to the investments landscape. In Tanzania, following the 2015 presidential election, the fifth government has intensified the government's campaign to streamline investments in

natural and strategic resources.[1] To achieve the wider reforms in investments in natural and strategic resources, the government enacted a series of legislation including the Natural Wealth and Resources (Permanent Sovereignty) Act and Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act in 2017.[2] It also amended other sectoral laws such as those relating to the mining sector.

Natural wealth and resources are defined as "all materials or substances occurring in nature such as soil, subsoil, gaseous and water resources, and flora, fauna, genetic resources, aquatic

---

1 This is also associated with the recommendations to the government by the Presidential Committees formed to examine legal and economic implications on the country's export of gold and mineral concentrates. This was prompted by the discovery of suspicious 277 containers of gold and mineral concentrate belonging to Tanzania's biggest gold miner and London Stock of Exchange listed Acacia Mining Plc at the port of Dar es Salaam. Coincidentally, the discovery was done by the visit of the President of Tanzania himself, H.E. Dr. John Pombe Joseph Magufuli, to the port of Dar es Salaam in March 2017. He spontaneously barred their export pending verifications of values and types of minerals in the mineral sand in containers. For details see *'Muhtasari, 'Taarifa Ya Kamati Maalum Iliyoundwa Na Rais Wa Jamhuri Ya Muungano Wa Tanzania Mhe. Dkt. John Pombe Magufuli Kuchunguza Mchanga Ulio Katika Makontena Yenye Mchanga Wa Madini (Makinikia) Yaliyopo Katika Maeneo Balimbali Nchini Tanzania',* Tanzania Invest, 25 May 2017, available at <https://www.tanzaniainvest.com/wp-content/uploads/2017/05/Report-Investigation-Committee-contents-mineral-sands-concentrates-export.pdf > accessed 15 May 2018; Tanzania Invest, 'Tanzania to Renegotiate Mining Contract with New Laws', Tanzania Invest, 4 July 2017, available at <http://www.tanzaniainvest.com/mining/new-laws> (accessed 14 May 2018); Reuters Staff, 'Tanzania's President Signs New Mining Bills into Law', Reuters, 10 July 2017, available at <https://www.reuters.com/article/us-tanzania-mining/tanzanias-president-signs-new-mining-bills-into-law-idUSKBN19V23P> (accessed 2 January 2018). Also see Permanent Secretary of the Ministry of Energy and Minerals, United Republic of Tanzania, 'Export Ban of Metallic Mineral Concentrates and Ore' *Press Release*, Dar es Salaam, 3 March 2017.

2 Government of Tanzania, 'Special Bill Supplement No. 3 *Special* Gazette of the United Republic of Tanzania No. 4 Vol. 98 of June 2017, Memorandum of Objects and Reasons to the Bill of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.

resources, micro-organisms, air space, rivers, lakes and maritime space, including Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone[3] which can be extracted, exploited or acquired and used for economic gain, whether processed or not".[4]

One of the key measures[5] brought by the 2017 laws was to prohibit proceedings in foreign courts or tribunals that involve questions of Tanzania's sovereignty over all of its natural wealth and resources. Such disputes henceforth were only to be adjudicated by bodies or organs established in, and in accordance with laws of, Tanzania.[6] Nevertheless, in 2020, this prohibition was relaxed by allowing bodies established outside Tanzania to hold arbitration on disputes

---

[3] Rights of a coastal state over the Exclusive Economic Zone (EEZ) and continental shelf are provided under Article 56 and 77 respectively of the UN Convention on the Law of Sea. Largely, EEZ is about living resources while non-living resources are dealt with under the concept of continental shelf.

[4] S. 3 of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017; S. 3 of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017. The Natural Resources Act, Cap 259 defines 'natural resources' as (a) the soil and waters of Mainland Tanzania; (b) the animal, bird and fish life of Mainland Tanzania; c) the trees, grasses and another vegetable products of the soil; and (d) such other things as the Minister responsible for natural resources may, by proclamation in the Gazette, declare to be natural resources.

[5] Other measures include the proclamation of permanent sovereignty of people of Tanzania over all natural wealth and resources; creation of a lien over any material, substance, product or associated products extracted from the mining operations or mineral processing such as mineral concentrates; enabling government to review and renegotiate all mining developments agreements against unconscionable terms; introducing Regulations over stabilization clauses in the extractives sector; and ,[5] and the enhancement of the oversight and advisory functions of the National Assembly to review any agreements or arrangements made by the government relating to natural wealth and resources. See the Natural Wealth and Resources (Permanent Sovereignty) Act and Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act of 2017.

[6] S. 11(2) and (3) of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017.

involving natural resources in Tanzania.[7] In any case, terms of any agreement or arrangement are deemed unconscionable and treated as such if they contain provision subjecting the State to the jurisdiction of foreign laws and forums.[8] Accordingly, all relevant existing agreements, such as the BITs, involving Tanzania, which are governed by foreign laws and whose jurisdiction is vested in the foreign forum as a seat of arbitration will be reviewed and renegotiated.

On international arbitration regime, the major wider reform came with the enactment of the Arbitration Act in 2020 ('the Arbitration Act'). This Act facilitates alternative dispute resolution outside the court system as well as the enforceability of arbitration agreements.[9] It provides for the conduct of domestic and international commercial arbitration delineating the court's power of support and supervision with greater emphasis on the arbitration agreement. According to the Act, parties submit to arbitration voluntarily. Indeed, the Act recognizes Mainland Tanzania's obligations imposed by international legal instruments. It also reinforces the measures under the 2017 laws.

---

7 S. 100 of the Arbitration Act 2020, amending s. 11(2) and (3) of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017.

8 S. 6(2)(i) of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017.

9 The Act has thirteen parts covering 102 sections. Part 1 contains preliminary provisions covering issues of interpretation and application to Mainland Tanzania; Part II and III contain general provisions and arbitration agreements. Part IV provides for commencement of arbitral proceedings; Part V is on the arbitral tribunal; Part VI relates jurisdiction of the arbitral tribunal; Part VII relates arbitration proceedings; Part VII relates to costs of arbitration; Part IX deals with powers of the court relating to arbitral awards; Part X sets up the Tanzanian Arbitration Centre; Part XI provides for the enforcement of arbitral awards; Part XII covers miscellaneous provisions; and Part XIII deals with consequential amendments.

2. AN OVERVIEW OF THE ARBITRATION ACT

The law relating to arbitration functions in three dimensions, namely, the law governing the parent agreement (governing law of the contract), the law governing the arbitration agreement (governing law of the arbitration agreement) and the law applicable to the arbitration.[10] Broadly, they may be divided into laws applicable in the arbitration (the governing laws) and laws applicable to the arbitration (the *lex arbitri* or curial law).[11]

While arbitration legislation often provides for matters such as the validity of the arbitration agreement, and certain substantive conditions for the enforcement of the resulting arbitral award, they largely provide for the procedure to be followed during the arbitration delineating the procedural rights of the parties relating to the arbitration. While the Arbitration Act does just that, it preserves fundamental features of arbitration such as party autonomy, severability of the arbitration agreement, judicial restraint and support, as well as the international regime for enforcement.

The Arbitration Act draws from the wealth of experience found in the other jurisdictions which have attracted international arbitration in the past decades. Notably, it borrows from the UN Commission on International Trade Law Model Law on International Commercial Arbitration ('Model Law'),[12] UNCITRAL Arbitration Rules of 1976,

---

[10] Blackaby, N. and Partaside, C., et al (eds.), *Redfern and Hunter on International Arbitration*, (6th Edn.), OUP, 2015, at p. 155; Gaillard, E. and Savage, J. (eds.) *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, at p. 31; Lew, J.D.M., *Applicable Law in International Commercial Arbitration*, Oceana Publications, 1978; Born, G.B., *International Commercial Arbitration*, Kluwer Law International, 2014, at p. 73.

[11] Paulsson, J., 'Arbitration in Three Dimensions', 60 *ICLQ*, 2011, at p. 291; Gaillard, E., *The Legal Theory of International Arbitration*, Martinus Nijhoff Publishers, 2010, at p. 20.

[12] UNGA Resolution 40/72 (11 December 1985) UN Doc. A/RES/40/72.

the English Arbitration Act of 1996 and the UN Convention on the Recognition and Enforcement of International Arbitral Awards ('New York Convention').[13] These laws have had a profound impact on the sources of arbitration law across the world.

The Arbitration Act treats a dispute as international if it is a commercial dispute with an international element. It broadly defines international arbitration as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Tanzania. And, at least one of the parties must be (a) a foreigner or habitually resident in a country other than Tanzania; (b) a body corporate which is incorporated in any country other than Tanzania; (c) an association or a body of individuals whose central management and control is exercised in any country other than Tanzania; or (d) a government of a foreign country.[14]

The interpretation provision contained in section 3 of the Arbitration Act, defines key terms in consonance with the various sources from which the Act draws certain provisions. For instance, the definition of 'arbitration', 'arbitration agreement', 'court', 'international arbitration' follows the UNCITRAL Model Law, while that of 'foreign award' complies with the New York Convention. The definition of "confidential information" closely follows the provisions of the UNCITRAL Arbitration Rules of 1976 as well as the most popular Arbitral Institutional Rules of the London Court of International Arbitration (LCIA), the International Chamber of Commerce.

---

[13] UN Convention on the Recognition and Enforcement of International Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) (1959) 330 UNTS 38.

[14] Section 3 of the Arbitration Act 2020.

With the exception of section 6 (seat of arbitration) and Parts X (section 77) and XI (sections 78 - 80) on enforcement, the provisions have drawn from the English Arbitration Act, 1996 which has been in force in England, Wales and Northern Ireland for over two decades. The provisions have functioned well over the years and have been instrumental in maintaining London as the most preferred destination for international arbitration as confirmed recently in an influential survey.[15] While some critics have criticized the English law on this aspect to be broad in providing powers to intervene in arbitration proceedings to the English Courts, judicial pronouncements and legislative reform efforts first in 1979 and then in 1996 have tampered this tendency to the minimum.[16] On the whole, only limited criticism is available in literature against the English Act and largely limited to the aforesaid aspect.[17]

Under section 6 of the Arbitration Act, seat of arbitration is defined as a juridical seat of arbitration designated (a) in accordance with the law applicable on matters that are subject of the arbitration; (b) by the parties to the arbitration agreement; or (c) by any arbitral

---

15 White & Case and Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2018, available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 2 March 2020).

16 Departmental Advisory Committee, 'A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law, The Rt. Hon. Lord Justice Mustill, Chairman', 6 *Arbitration International*, 1990, at p. 3; Departmental Advisory Committee on Arbitration Law, 'The 1996 DAC Report on the English Arbitration Bill: The Last Part', 15 *Arbitration International*, 1999, at p. 413.

17 Steyn, J., 'Towards a New English Arbitration Act', 7 *Arbitration International*, 1991, at p. 17; Uff, J. and Keating, D., 'Should England Reconsider the UNCITRAL Model Law or Not?', 10 *Arbitration International*, 1994, at p. 179; Saville, M., 'The Origin of the New English Arbitration Act 1996: Reconciling Speed with Justice in the Decision-making Process', 13 *Arbitration International*, 1997, at p. 237; Hunter, J.M. and Landau, T.T., *The English Arbitration Act 1996: Text and Notes*, Kluwer Law International, 1998.

tribunal or other institution or person vested by the parties with powers in that regard. In the context of arbitration in disputes relating to the natural wealth and resources, the applicable law designates Tanzania as the seat of arbitration.[18]

The relevance of the seat of arbitration needs a mention. Under the New York Convention, while awards would only be subjected to merits review at the seat of arbitration, enforcing states undertook to carry out only a limited review restricted to the specified grounds.[19] To this end, if the New York Convention ushered in an era of restriction of judicial intervention in the enforcement of international awards, the Model Law sought to restrict the scope for judicial supervision of the arbitration at the seat. That is why, with a view to promoting further harmonization, the Model Law adopts the same grounds for setting aside and challenge of arbitral awards as prescribed in Article V of the New York Convention.[20]

---

[18] S. 11(2) and (3) of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017.

[19] Article V of the Convention. See Nacimiento, P., 'Article V(1)(a)' in Kronke, H., *et al.*, (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Wolters Kluwer, 2010, at p. 205.

[20] Article V provides that "(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The

The provisions relating to confidentiality (sections 36A, 36B, 36C) are largely drawn from the UNCITRAL Arbitration Rules, 1976 which provide for proceedings to be held in camera.[21] Accordingly, the provisions have not been listed in the mandatory provisions and may be excluded from application by the agreement of the parties.[22] The Arbitration Act also maintains a fair balance between transparency and confidentiality in its detailed provisions on confidentiality taking into considerations its own past experience[23] and judicial experience from a number of other countries relating to mandatory disclosures.[24]

As regards the conduct of the arbitration, the Arbitration Act provides robust and efficient procedures that has been in force and generated a considerable amount of jurisprudence leading to certainty in legal procedures. Foreign investors who are familiar with arbitrating in England will find the law of Tanzania familiar and

---

award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

21 See Article 28 of the UNCITRAL Arbitration Rules 2013.

22 See section 7 of the Arbitration Act 2020.

23 See for e.g. *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* ICSID Case No. ARB/05/22, Procedural Order No. 3 in which Mr. Nimrodi Mkono, Managing Partner of Mkono & Co. had to provide explanations to the Guardian Newspaper in Tanzania Regarding the case, which it had misrepresented earlier.

24 Trakman, L.E., 'Confidentiality in International Commercial Arbitration', 18 *Arbitration International*, 2002, at p. 1; Hwang, M. and Thio, N., 'A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self Governing Code', 29 *Journal of International Arbitration*, 2012, at p. 137. For an excellent exposition of the treatment of confidentiality in various legal systems see Poorooye, A. and Freehily, R., 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance', 22 *Harvard Negotiation Law Review*, 2017, at p. 275.

receptive to their interests of neutrality, confidentiality, economy, expediency and above all certainty, in its application.

However, one among key distinctions between the Tanzanian Arbitration Act and the English Arbitration Act, 1996 as well as the Model Law pertains to the recourse against arbitral awards that are available before the Courts. This can be explained under the challenge procedure and appellate procedure as follows:

2.1 Challenge procedure

While the English Arbitration Act, 1996 in sections 67 and 68 corresponding to the sections 69 and 70 of the Tanzanian Arbitration Act, provide for challenging the award on grounds of lack of substantive jurisdiction and serious irregularity the Model Law provides for challenge on grounds of lack of substantive jurisdiction relating to incapacity of parties and validity of the arbitration agreement,[25] *excess de pouvoir* or *ultra-vires*,[26] and arbitrability.[27] Serious irregularity as a ground for challenge of the award under the Model Law has been provided in Article 36(a)(ii) and (iv) relating to serious irregularity in procedure and under Article 31(1)(b)(ii) dealing with public policy.

While the provisions on challenge of arbitral awards under the Arbitration Act does not have much of a material deviation from the Model Law, they afford far more discretion to the Court in applying the provisions as opposed to the circumscribed language employed in the Model Law. Apart from providing discretion to the Courts in relation to setting aside arbitral awards, the Arbitration Act, provides the award-debtor with an unusual third right of challenge provided,

---

[25] Article 31(1)(a)(i) of the Model Law.
[26] Article 31(1)(a)(iii) of the Model Law.
[27] Article 31(1)(b)(i) of the Model Law.

albeit implicitly, in section 78 relating to recognition and enforcement of arbitral awards.

Section 78(2) is drafted in mandatory language employing the use of the word ‘shall’ and provides for a number of grounds on which the Court is bound to refuse the enforcement of an arbitral award. In addition, the provision specifies that it applies both to foreign as well as domestic arbitral awards.

Save for section 78(2)(c)(ii) which provides that the enforcement of the arbitral award shall be refused if it would be “contrary to any written laws or norms” all the grounds enumerated in section 78(2) correspond to Article 36 of the Model Law and Article V of the New York Convention. Further, adding an additional restriction on the enforcement of foreign awards, sub-section (4) of section 78 repeats the same grounds for non-recognition as provided for in Article V of the New York Convention.

It is submitted that difficulties arise in the interpretation of this provision especially when done in the context of the Act read with the other provisions as a whole.

Firstly, there exists a conflict between sub-sections (2) and (4); while the former is applicable to both foreign and domestic awards, the latter is applicable only to foreign awards. The provisions are almost identical except for the difference between an award being contrary to written laws or norms as opposed to public policy. It remains unclear as to whether the award-debtor will be entitled to two rights of action under section 78, one under a mandatory procedure where little discretion in vested in the court to act otherwise and the other under sub-section (4) where the provision envisages a degree of discretion to be afforded.

Secondly, section 5 of the Tanzanian Arbitration Act drawn from section 2(1) of the English Arbitration Act provides that its provisions shall only be applicable where the seat of arbitration is in Tanzania. A foreign award as defined in section 3 by virtue of its definition means an award where the juridical seat of arbitration is in a territory or state other than Tanzania. Therefore, it remains unclear whether section 78 which is clearly a provision of the Arbitration Act would apply to foreign awards, which by definition are seated outside Tanzania.

Thirdly, while section 78(2) is drafted in mandatory language and applies to all arbitration it has conspicuously been left out in the Schedule annexed to the Arbitration Act which provides for the mandatory provisions from which the parties may not contract out. Whether this allows parties to by-pass the provisions of section 78 by agreement remains to be seen. In cases where such an agreement exists and the seat of arbitration is outside Tanzania an anomalous situation may arise wherein the Courts will be bound to enforce the provisions of the Act without considering whether any of the grounds mentioned in section 78 is applicable.

2.2 **Appellate Procedure**

The most conspicuous difference between the Tanzanian Arbitration Act and the Model Law is the inclusion of a right to appeal from the award in the former Act. Sections 47 and 71 of the Arbitration Act which provide for the right of a party to apply to the court during the course of the proceedings as well as after the rendering of the award to determine a question of law, in effect grants appellate jurisdiction to the Courts over arbitrators.

While the provisions of section 47 and 71 of the Arbitration Act allow for close supervision of interpretation of legal provisions, they allow

a great deal of room for delaying tactics. In recent years such acts have been characterized as 'guerrilla tactics' in international arbitration the most common of which is to make frivolous application to the Court wherever a slim chance of its success exists.[28]

Sections 47 and 71 of the Arbitration Act are prone to such abuse as is apparent from the experience in the English context, where the right in response to sharp criticism was substantially circumscribed through judicial pronouncements and amendments in 1979.[29] English law in spite of being mindful of its requirement still suffers from such criticism from some users and scholars comparing with other jurisdictions.[30]

Therefore, it appears to an outside observer that there exists not one, as is usually the case in most jurisdictions, but four chances for the respondent to seek judicial intervention in the arbitration thus giving judges wide discretionary powers in such matters to determine issues that the parties had in fact submitted to arbitration. Increased discretion vested with the courts may lead to exacerbation of differences in the interpretation of the provisions leading to uncertainty in outcomes and delays in adjudication; which would, save for the clear requirement of law, ultimately deter foreign investors from choosing Tanzania as the seat of arbitration. The increased avenues for seeking binding decisions in relation to the subject matter also raise concerns of party autonomy and neutrality.

---

[28] Hwang, M., 'Why is there still resistance to arbitration in Asia?', in Hwang, M. (ed.), *Selected Essays on International Arbitration*, Academy Publishing, 2013, at p. 20.

[29] Id, at p. 15.

[30] Gaillard, *Goldman on International Commercial Arbitration*, above note 10, at pp. 72-73.

From the perspective of the investment obligations undertaken by Tanzania in its various BITs, delay in the enforcement of foreign arbitral awards could also serve as the basis for claim by an investor, as has been the case in *White Industries v. India*[31] and *Sapiem S.p.A. v. Bangladesh.*[32] Subjecting foreign arbitral awards to merits review on law and facts would run contrary to the intentions of New York Convention and may also serve as the basis for investment claims.

3. INTERNATIONAL INVESTOR-STATE ARBITRATION

An investment regime is a multifaceted concept in which the existence of a dynamic and effective legal regime for settlement of investment dispute is one of the major components in creating a favorable investment climate. It is also necessary in attracting foreign capital. Traditionally, investment disputes have been adjudicated often by the national courts of the host States. It is the national courts which enjoy preliminary jurisdiction over the activities taking place within the territories of the host States. In other words, as investment disputes always involve a Nation-State as one of the parties, they are also often subjected to the rule of exhaustion of local remedies for the investor to approach an international forum.[33]

---

31 *White Industries Australia v The Republic of India*, UNCITRAL, Final Award, 30 November 2011 wherein the tribunal held that India has violated the effective means of enforcing claims standard by causing undue delay in the enforcement of a foreign award.

32 *Sapiem S.p.A. v The People's Republic of Bangladesh* ICSID Case No. ARB/05/07, Award, 30 June 2009 wherein the tribunal held that Bangladesh had violated the New York Convention and international law generally by passing an anti-suit injunction against the arbitral tribunal and revoking its authority contrary to the New York Convention.

33 Perumal, R.M., 'Settlement of Investment Disputes and WTO Dispute Settlement Mechanism', Doctoral Thesis, Jawaharlal Nehru University, New Delhi, 1996.

In some cases, host States prefer to retain control over the disputes arising in their territories to the extent of excluding international methods of dispute settlement by restricting the foreign investors to local remedies alone. Many States are expressing reluctance to the inclusion of Investor-to-State Dispute Settlement (ISDS) provisions in international investment agreements by surrounding the dispute resolution clauses with numerous exemptions.[34] The experience of Brazil shows that "direct access of foreign investor to international arbitration would place her in equal footing with the Brazilian sovereignty, and this would be equivalent to protecting the investor to the detriment of national interests."[35] Reform in arbitration laws is therefore intrinsically connected to judicial reforms.

Indeed, foreign investors are often skeptical about national courts as a reliable means of dispute settlement as investment agreements are innately designed to protect foreign investors. In fact, it is only investors that may initiate international investment

---

[34] Farell, H., 'People are freaking out about the Trans Pacific Partnership's investor dispute settlement system. Why should you care?', Washington Post, 2015, available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/26/people-are-freaking-out-about-the-trans-pacific-partnerships-investor-dispute-settlement-system-why-should-you-care/>; 'Cut Your Teeth, Sovereignty at stake? Wikileaks releases draft TPPA chapter on investment', 2015, available at <http://cutyourteeth.co/2015/03/27/sovereignty-at-stake-wikileaks-releases-draft-tppa-chapter-on-investment/>, (accessed 5 May 2020).

[35] Volterra, R.G. and Mandelli, G.F., 'India and Brazil: Recent Steps towards Host State Control in the Investment Treaty Dispute Resolution Paradigm,' (2017) 6 *Indian Journal of Arbitration Law*, 2017, at p. 105. Also see Vilizzio, M.B., 'South America facing bilateral investment treaties: towards a return of the State in dispute settlement', PNK Fellowship Working Paper Series, 2014, at p. 4, available at <http://www.observatorylatinamerica.org/en/component/content/article/40-working-papers-pnk/585-south-america-facing-bilateral-investment-treaties-towards-a-return-of-the-state-in-dispute-settlement> (accessed 15 May 2018); Nel, P., 'The Rise and Fall of BITs', University of Otago, 10 October 2014, at p. 8, available at <https://www.otago.ac.nz/politics/otago061036.pdf> (accessed 15 May 2018); Poulsen, L.S., 'The Politics of South-South Bilateral Investment Treaties' in Broude, T. and Busch, M.L., *The Politics of International Economic Law*, CUP, 2011, at p. 186.

claim proceedings against the State, even without exhausting local remedies. Nevertheless, according to the International Court of Justice in the *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy),* the principle of exhaustion of local remedies is an important principle of customary international law.[36] It is often called the *Calvo* Doctrine.[37] Article 26 of ICSID Convention incorporates the Calvo Doctrine that "A contracting state may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention".

However, Robert French, the then Chief Justice of the High Court of Australia alluded to the misuse of ISDS mechanisms as in the *Philip Morris v. Australia.*[38] He expressed his concerns in *Eli Lilly v. Government of Canada:*[39]

---

[36] *Electronica Sicula S.p.A. (ELSI), (United States v. Italy),* (Judgment) [1989] ICJ Rep 15; For discussion see Perumal, Settlement of Investment Disputes and WTO Dispute Settlement Mechanism, above note 33, at p. 48.

[37] Calvo Doctrine was developed by the Argentinean lawyer Carlos Calvo in 1868 based on the principles of sovereign equality, non - intervention and equal treatment between foreigners and national. In terms of the doctrine, sovereign States have the right to determine their internal and external policies, without foreign interference, and since foreigners have equal rights as nationals, it should naturally follow that they must exhaust domestic remedies without asking for protection or diplomatic intervention from their home States. See Vilizzio, South America facing bilateral investment treaties: towards a return of the State in dispute settlement, above note 35; Schreur, C., 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', 4 *The Law and the Practice of International Courts and Tribunals*, 2005, at p. 1; Titi, C., 'Investment Arbitration in Latin America', 30 *Arbitration International*, 2014, at p. 357.

[38] Philip Morris Launches Legal Battle Over Australian Cigarette Packaging, 2011, in Bridges, Volume 15 - Number 24, available at <http://www.ictsd.org/bridges-news/bridges/news/philip-morris-launches-legal-battle-over-australian-cigarette-packaging>, (accessed 12 December 2019).

[39] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, available at <http://www.italaw.com/cases/1625#sthash.jJtWkUY8.dpuf> (accessed 5 January 2020).

> After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treat agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law.[40]

India is moving away from ISDS in favour of Joint Committees determinations. Germany has also expressed its concerns through its Economy Minister, Brigitte Zypries who said "From the perspective of the [German] federal government, US investors in the European Union have sufficient legal protection in the national courts"; and on that ground there is no reason for the inclusion of an ISDS mechanism in the treaty.[41]

Therefore, regardless of any rating in terms of democracy, rule of law or effective enforcement systems in any developing countries, foreign investors will usually avoid the host country's jurisdiction.[42] This is exemplified by the decision of the ICSID Tribunal in *Emilio Agustín Maffezini v. The Kingdom of Spain* in which the Tribunal observed:

---

[40] Aftinet.org.au, Leaked TPPA trade chapter: Australia says no to investor rights to sue, fair trade groups demand release of all text (2012), available at <http://aftinet.org.au/cms/trans-pacific-partnership-agreement/leaked-tppa-trade-chapter-australia-says-no-investor-rights-sue->, (accessed 25 December 2019).

[41] Rajoo, S., Trends in Investor-State Dispute Settlement in the Asia Pacific: Reassessing the Role of Asian International Arbitration Centre (AIAC), 2020, at p. 11 (unpublished).

[42] Stephenson, A. and Carrol, L. 'The Trans-Pacific Partnership: Lessons Learned for ISDS', in Legum, B., (ed.), *The Investment Treaty Arbitration Review*, The Law Reviews (2nd Edn.), 2017, at p. 303.

> Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred.[43]

International arbitration is, therefore, regarded as the ideal dispute resolution method for cross-border transactions involving parties from different legal and cultural backgrounds.[44] Lack of trust among the parties to a commercial transaction regarding each other's national court systems is the main reason why parties prefer the decision of an arbitrator or a panel of arbitrators. Accordingly, some developing countries in the desire to create a good investment climate do not insist on compulsory jurisdiction of local courts; and as a result the involvement of national courts, as a means of settlement of investment dispute, becomes minimal.[45] Arguably, this may contribute to the current state where a sizeable number of awards in international arbitration cases involving developing countries actually go against them.

Foreign investors non-preference of local courts is not about the lack of effectiveness of the particular courts. The main reason for this is lack of trust. In the words of Charles Brower:

> Parties to international transactions choose to arbitrate disputes, *not* because arbitration is simpler than litigation, *not* because arbitration is cheaper than

---

[43] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (25 January 2000) para 55.

[44] Zakaria, T.A., Rajoo, S. and Koh, P. (eds.), *Arbitration in Malaysia: A Practical Guide*, Sweet & Maxwell, 2016, at pp. viii.

[45] Perumal, Settlement of Investment Disputes and WTO Dispute Settlement Mechanism, above note 33, at p. 49.

> litigation, not because arbitration is final and binding and therefore substantially unreviewable, *not* because arbitrators may have greater expertise than national judges.
>
> They arbitrate simply because neither will suffer its rights and obligations to be determined by the other party's State of nationality. In a word each has 'a distrust of the other's national court'.[46]

And from the developed nation's points of view, as reflected upon by the Elihu Root the former Secretary of State of the US, while speaking to the Arbitration and Peace Congress in New York in 1907:

> It … seemed to … that the greatest obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their disputes to the decision of an impartial Tribunal. It is the apprehension that the Tribunal selected will not be impartial.[47]

Therefore, arbitration may not always be a neutral forum.[48] However, since cross-border trade and investment transactions involving parties from different legal and cultural backgrounds is the basis of the arbitration, adoption of appropriate national arbitration laws have been part and parcel of many economic reforms in order to attract and promote competitive economy and direct foreign

---

[46] Nariman, F.S., 'Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, Kuala Lumpur, 2017 (unpublished); Brower, C.N., and Lillich, R.B., (eds.) *International Arbitration in the 21st Century*: *Towards Judicilaisation and Uniformity*?, 1994.

[47] Nariman, *Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction*, above note at 46, at p. 7.

[48] For advantages and disadvantages of arbitration see Sutton, D.S.J., Gill, J., and Gearing, M., *Russell on Arbitration*, (24th Edn.), Sweet & Maxwell, 2015, at p. 9.

investments (FDI). That is why also parties to the disputes, including States, have a tendency to choose an arbitration seat whose arbitration law follows the international norms to which most States are accustomed, for example, the Model Law.[49]

The Investment Treaty Arbitration is a major part of international arbitration landscape in Africa under BITs. African experience in BITs arbitration has been dismal as foreign investors have used investor-State dispute settlement claims to challenge measures adopted by the host-State even when they are in the public interest.[50] At the same time proliferation of investment treaties is the main reason for dramatic increase in international arbitration involving States and State entities either before local or at international fora.[51] These treaties confer upon investors some

[49] Gastorn, K., 'Examination of Arbitration Related UNCITRAL Texts and Their Adoption by African States', SOAS Arbitration in Africa Conference, London, 3 April 2017, available at <http://www.aalco.int/Spee ch%20by% 20SG%20at%20CIRCICA.pdf> (accessed 15 May 2018).

[50] Nariman, *Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction*, above note at 46, at pp. 6-9; Corporate Europe Observatory and Transnational Institute, 'Profiting from Injustice: How Law Firms, Arbitration and Financiers are fuelling an Investment Arbitration Boom', *Transnational Institute*, 27 November 2012, available at <https://www.tni.org/files/download/profitingfrominjustice.pdf> (accessed 15 May 2018).

[51] Adekoya, F., 'Is International Arbitration Truly International - The Role of Diversity', Annual Conference on Energy Arbitration and Dispute Resolution in the Middle East and Africa, London, Transnational Dispute Management, 8 March 2018, at para 5, available at <https://www.transnational-dispute-management.com /journal-advance-publication-article.asp?key=1701> (accessed 15 May 2018). At the ICSID as of 31 December 2016, five cases were Registered involving Tanzania: (a) *Tanzania Electric Supply Company Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/8, (b) *Biwater Gauff (Tanzania) Limited* vs *Tanzania*, ICSID Case No. ARB/05/22, (c) *Standard Chartered Bank* vs *Tanzania*, ICSID Case No. ARB/10/12 (d) *Standard Chartered Bank (Hong Kong) Limited* vs *Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20 (e) *Standard Chartered Bank (Limited) Hong Kong* vs *Tanzania*, ICSID Case No. ARB/15/41.

rights aimed at protecting their investments which are directly enforceable against the host States.[52]

Of recent, limiting recourse to international arbitration or forum on targeted disputes from a particular sector, like natural wealth and resources, has become a growing norm in some developing countries. For instance, the Protection of Investment Act of 2015 of South Africa promotes local courts and bodies as the hub in solving all investment disputes in the country.[53] It restricts foreign investors to the State courts, unless the dispute is solved by local mediation; it prohibits private arbitration in arbitrating non-contractual disputes with foreign investors; and it only allows State-to-State arbitration. The State-to-State arbitration is also subject to the exhaustion of local remedies.[54] The Act also provides that all investments will be established in compliance with the laws of the Republic and foreign investors and their investments will not be treated less favorably than local investors in like circumstances.[55]

4. CONCERNS ON INVESTOR-STATE ARBITRATION

In the 1980s, when alternate dispute resolution mechanisms were promoted especially in commercial and investment disputes, legal and trade experts heralded arbitration as a sensible, cost-effective way to keep corporations out of court and away from the hassles of litigation that financially takes a toll on both the litigating parties. As a result, many large corporations included arbitration clauses in their agreements considering that it would be cost and time efficient.

---

[52] Sutton, *Russell on Arbitration*, above note 48, at p. 108; Gastorn, *Examination of Arbitration Related UNCITRAL Texts and Their Adoption by African States*, above note 49.

[53] Butler, D., 'The Attitude of the South Africa Government to Arbitration', SOAS Arbitration in Africa Conference, London, 3 April 2017, at p. 52 (unpublished).

[54] Id, at p. 53.

[55] Protection of Investment Act 2015, s 8 and 9.

These great hopes from arbitration are, however, fading in some cases as a cost and time efficient mechanism.[56]

On a wider scale, a shift in the attitude of a number of developing States towards investor-State arbitration is perceptible as a number of countries are actively reconsidering their exposure to these processes. One common critic to ISDS, which also explains the frustration of a growing number of emerging countries, is the developed-countries based framework. The western based institutions such as the World Bank and Transparency International set standards and indices depicting that judicial systems in developing countries are not independent, impartial and or competent. As a result, the main investment arbitration institutions are based in developed countries; so are the vast majority of key players such as arbitrators and counsel. Indeed, it has been reported that only 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes in the world.[57]

At the behest of elite corps of international arbitrators, arbitration too often mutates into a litigation it is supposed to prevent. Many institutions dealing with arbitration, typically include a lot of excess baggage in the form of motions, briefs, discovery, depositions, judges, lawyers, court reporters, expert witnesses, publicity, and damage awards beyond reason (and beyond contractual limits). Moreover, since parties are free to choose the governing rules, the

---

[56] Gastorn, K., 'Opening Address', Kuala Lumpur International ADR Week 2017, Kuala Lumpur, 15 May 2017, at p. 8 (unpublished).

[57] Khor, M., Fuelling an Investment Arbitration Boom, 2013, available at Indepthnews.info <http://www.indepthnews.info/index.php/global-issues/1702-fuelling-an-investment-arbitration-boom>, (accessed 2 September 2015). See Rajoo, Trends in Investor-State Dispute Settlement in the Asia Pacific: Reassessing the Role of Asian International Arbitration Centre (AIAC), above note 41, at p. 9.

procedure is often allowed to become a litigation look-alike. Whenever that happens, the cost of Arbitration begins to approach the cost of litigation that it is supposed to replace. The contending parties often waste prodigious quantities of time, money, and energy by reverting almost automatically to the habits of litigation. They pursue discovery, file motions, and rely excessively on expert witnesses—exactly the way they would in a lawsuit.[58] International arbitrations are also increasingly precedent-bound, containing far too frequent citations from other arbitral awards and contributing to the *Lex Mercatoria*.[59]

For instance, some of the systemic deficiencies with Investment Treaty Regime as identified in the official report of the United Nations Conference on Trade and Development (UNCTAD) 2013/2014 are: (a) absence of the possibility of erroneous decisions of the arbitral tribunal being corrected on a review, (b) findings in arbitral decisions being inconsistent - with divergent legal interpretations of identical or similar treaty provisions; (c) grave concerns relating to independence and impartiality of arbitrators; there has been an increasing number of challenges to arbitrators indicating that disputing parties perceive them as biased, or pre-disposed to a particular pre-conceived point of view;[60] (d) the actual

---

[58] Id, at p. 8.

[59] A body of substantive law developed by the community of international merchants and traders.

[60] For instance, in three recently decided cases by the Chairman of ICSID, in each of these cases, challenges to the independence of the arbitrators have succeeded by applying a lower standard than in the past – *a standard of 'reasonable doubt' – not the previously preferred standard of 'high probability'* (of bias). These are *Blue Bank International & Trusts (Barbados) vs. Bolivarian Republic of Venezuela,* ICSID Case No. ARB 12/20 (ITA Law, 2 March 2018), available at < https://www.italaw.com/sites/default/files/case-documents/italaw9533.pdf> (accessed 15 May 2018);
Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB 08/5 (ITA Law, 13 December 2013) available at <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf>

practice of the investor-State dispute system having put in doubt the oft-quoted notion that arbitration represents a speedy and low-cost method of dispute resolution; (e) that investor-State disputes – go on far too long – many of which take several years to conclude; and (f) that large and prosperous law-firms dominate international investment arbitrations – charging high fees and employing expensive litigation-techniques: their representatives also indulge in burdensome and excessive document-discovery and long arguments.[61]

The ongoing discussion under the Working Group III of the UNICTRAL on reforming the Investor-State Dispute Settlement system (ISDS), confirms above concerns raised by UNCTAD. The UNCITRAL is a legislative body of the United Nations towards developing harmonized and unified international law in the field of international commerce. It has identified core issues with ISDS as including: (a) lack of consistency, coherence and even correctness of the outcome of arbitral awards, which is merely linked to the ad hoc nature of the current system; (b) lack of uniform etiquettes on the way the adjudicators or arbitrators are designated, and the way they are operating to the extent that they are sometimes wearing two hats (the so-called double hatting); (d) concerns about the independence and impartiality of the system; (e) cost and duration of these procedures; and (f) third-party funding, which is

(accessed 15 May 2018); and *Caratube International Oil C LLP v Republic of Kazakhstan*, ICSID Case No. ARB 13/13 (ITA Law, 20 March 2013), available at https://www.italaw.com/sites/default/files/case-documents/italaw3133.pdf. (accessed 15 May 2018). Also see Nariman, *Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction*, above note at 46, at p. 13.

61 Nariman, *Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction*, above note at 46, at p. 7.

increasingly becoming popular amongst claimants that either seek to receive funding because they are themselves impecunious.[62]

The UNCITRAL Arbitration Proceedings in *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* can be cited as one of the cases showing divergent and inconsistent findings in arbitral decisions based on identical treaty provisions and facts, as well as the concerns on the independence and impartiality of arbitrators. In this case, the dissenting opinion of JUDr Jaroslav Hándl, one of the three Arbitrators, against the Partial Arbitration Award, indicates that the other two arbitrators (Dr. Wolfgang Kühn and Judge Stephen Schwebel) firstly had agreed upon the final decision to be expressed in the Award and only thereafter they looked for the arguments to the favour of the Claimant. They were allegedly pre-disposed to a particular pre-conceived point of view. Mr. Handl's, who later resigned from this investment case,[63] concluded his dissenting opinion thus:

> From the whole Dissenting opinion, it can be seen the violation of the arbitration principles, but only main points are mentioned, as follows:
>
> - wrong ascertaining of facts, partly due to full accepting of the allegations of the Claimant without asking him to prove them and non-enabling to the Respondents to prove his points by asking the documents specified by the Respondent from the Claimant, - wrong legal conclusions as to the legal analysis of the

[62] Joubin-Bret, A., UNCITRAL, Public Lecture Delivered on 20 March 2019, at AALCO Headquarter, New Delhi, at p. 2 (unpublished).

[63] Replaced by Prof. Ian Brownlie.

provisions of the Netherlands - Czech Republic Bilateral Investment Treaty,

- non-taking into the consideration the Czech Law, as well as the wrong interpretation of the Czech law,
- non-respecting of the provisions of the Czech Law that are of mandatory character, e.g. the Media Law or the Administrative Proceedings Code, thereby violation of the principle to observe the public policy /order/ of the respective country,
- non-respecting of the internationally accepted principles of law, as e.g. impedimentum rei iudicatae,
- non-equal handling of Claimant and Respondent to the disadvantage of the Respondent and violating the principles of fairness, equality of arms and due process towards the Respondent.

For the good order's sake I would like to lay stress upon the fact that all of the above objections and arguments to the merits of the case have been told by me to the two arbitrators and above all to the Chairman before the Partial Award has been prepared.[64]

This case of *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (arbitrated in Stockholm) was a parallel case and based on same facts to another case of *Ronald S. Lauder v. The Czech Republic* arbitrated in London. Both cases were decided in 2001, by different arbitral tribunals and with two different outcomes. In *Ronald S. Lauder v. The Czech Republic*, the claim was dismissed

[64] UNCITRAL Arbitration Proceedings case *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Dissenting opinion of the Arbitrator JUDr Jaroslav Hándl against the Partial Arbitration Award, at pp. 22-23.

and in *CME Czech Republic B.V. (The Netherlands) v. Czech Republic,* the claim was upheld. The cases were based on the decision of the Czech Republic to liberalize broadcasting services and creating the Media Council to oversee the observance of media laws as the licenses granting authority. The new law removed, among others, the exclusivity licenses as a result some investors (including Claimants in above cases) were unable to compete in liberalized economy and went out of business. The CME, a Dutch corporation with a Czech subsidiary CNTS brought a dispute against the Czech Republic under the Netherlands Czech BIT, while Mr. *Ronald Lauder,* an American citizen, commenced arbitration proceedings against Czech Republic under the US-Czech BIT.

In *Ronald S. Lauder v. The Czech Republic,* the Arbitral Tribunal held that "the Respondent did not take any measure of, or tantamount to, expropriation of the Claimant's property rights within any of the time periods, since there was no direct or indirect interference by the Czech Republic in the use of Mr. Lauder's property or with the enjoyment of its benefits".[65] But with the same facts in *CME Czech Republic B.V. (The Netherlands) v. Czech Republic,* the tribunal held that Media Council's actions and omissions constituted expropriation of CME's investment.

One example of how expensive the international arbitration may be capable of endangering the wellbeing of the State's population is the recent case against Nigeria. In March 2018, the government of Nigeria was ordered to pay USD 6.6 billion plus interest by a tribunal whose majority was made up of retired British judges Lord Hoffman (chair) and Sir Anthony Evans QC. Interest on the award is about USD 2.3 billion, which continues to accrue at a rate of some

---

[65] *Ronald S. Lauder v The Czech Republic*, at para 201.

USD1.26 million per day. All this was made in respect of a failed gas-refining project, in which the company/investor (a BVI engineering and project management company founded by Irish nationals) had invested only some USD 40 million.[66] That means, an investor, having spent USD 40 million, would cost the government to pay USD 6.6 billion and USD1.26 million per day until the award sum is settled!

Many authorities have in fact cited Investment Treaty Arbitration as "arbitration game" and "arbitration without – privity"[67]. In fact there is a growing consensus among international law scholars and practitioners that international arbitration is becoming closer to litigation and part of mainstream practice, leaving the term ADR to refer to mainly consensual rather than adjudicating processes. To others, ADR should not be understood as including arbitration.[68]

As Fariman puts it "the world over – in recent times – the downside about Dispute Resolution – by means of arbitration is that arbitrators selected by parties or by arbitral institutions have at times not been the most unbiased and independent".[69] This leaves one with no option but to agree with Sir Fredrick Pollock on how to criticize a judgment without appearing to be offensive that:

> If you are doubtful whether the judicial reasoning is

---

66 Abraham, C., 'Shift in paradigm of international trade and investment law in Asia and Africa: A call for Super-Regionalism', Talking Notes, Asian International Arbitration Centre, Kuala Lumpur, 22 July 2018 (unpublished).

67 Street, L., "Languages of Alternative Dispute Resolution", *ADRLJ*, 1992, at p. 145; Nariman, *Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction*, above note at 46, at p. 4; Paulson, J., 'Arbitration without Privity', 10 *ICSID Review - Foreign Investment Law Journal*, 1995, at p. 232.

68 Nariman, *Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction*, above note at 46, at p. 4.

69 Id, at p. 21.

> wholly unassailable you preface your comment on the judgment with the words: "*with respect*"; If the judgment is obviously, wrong you substitute "*with great respect*"; But if it is one of those judgments that have to be seen to be believed, then the formula is "*but with the greatest respect*![70]

This is relevant to many lawless arbitral awards that have to be seen to be believed. As Professor Pierre Lalive said:

> Of course, such awards are never *mine*. They are never *yours* – they are always someone else's![71]

Multinational corporations are often more powerful than small States. As held by Ian Brownlie in his separate opinion in *CME Czech Republic B.V. (The Netherlands) v. Czech Republic,* "the resources of a corporation entail considerable flexibility in changing the location of assets and in changing the organization of assets. The resources of a country, its human and natural resources, are a given: they are necessarily fixed".[72] At times, some multinational corporations or investors and their home countries, motivated by profit and quick gains, do coerce and or manipulate leadership and institutions of resources-endowed developing countries to commit to agreements on investments in natural resources. In this context, foreign investors do interfere with the sovereignty and domestic politics of developing nations by engaging in and encouraging corruption and other malpractices within the system, including circumventing public policies and laws of the host State.

---

70 Ibid.

71 Ibid.

72 *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award (14 March 2003) separate opinion by Ian Brownlie, at para. 76.

Even the principles of legality and good faith have been held as not forming the constitutive elements of concessionary or investment agreements. In *Mr. Saba Fakes v. Republic of Turkey,* the tribunal held:

> An investment might be 'legal' or 'illegal', made in "good faith" or not, it nonetheless remains an investment. The expressions 'legal investment' or 'investment made in good faith' are not pleonasms and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons.[73]

Corruption requires involvement of both parties. In some cases, foreign investors and investments are also exposed to a multiple legal and political risks in the host country, including corrupt government officials. Cases in which the ICSID have so far dismissed claimants' claims on the basis of corruption involved in concluding the investment agreements on the account of investors may further illustrate the point.[74]

The first case is the *World Duty Free Company Limited v. The Republic of Kenya* in which the claimants CEO admitted to making a personal donation of US$ 2 million to the President of the Republic of Kenya for duty free concessions in all Kenyan airports.[75] The second case is the *Metal-Tech Ltd v. The Republic of*

---

[73] In *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) para 112.

[74] As discussed in Lopez, C.M. and Martinez, L., Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration', in Legum, B., (ed.), *The Investment Treaty Arbitration Review*, *The Law Reviews*, 2014, at p. 145.

[75] *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006).

Uzbekistan,[76] in which the CEO of the claimant admitted to have paid US $ 4 million to consultants with connections to state officials including the brother of the Prime Minister to get investment contract for a plant to produce molybdenum. In *Siemens AG v. The Argentine Republic*[77] and *Azpetrol International Holdings BV and Others v. The Republic of Azerbaijan*[78] allegations and admission of corruption by the investors in bribing host State officials led to settlement of the cases.[79]

It is also important to note that the idea of arbitration as parties' choice and agreement to exclude or limit local courts and jurisdiction is as old as legal history from classical Roman law to English common law.[80] It differs from other forms of ADR mechanisms such a mediation and conciliation because of the binding nature of its awards.[81] And as put by Stephan Balthasar, "it is however, not uncommon to combine different dispute resolution methods in so-called 'multi-tier' clauses,[82] providing for an escalation of disputes in several steps, e.g., mediation followed by arbitration".[83]

---

[76] *Metal-Tech Ltd v. the Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013).

[77] *Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 January 2007).

[78] *Azpetrol International Holdings BV and Others v the Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award (8 September 2009).

[79] See Lopez, C.M., and Martinez, L., "Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration", in Legum, B., (ed.), *The Investment Treaty Arbitration Review*, The Law Reviews (2nd Edn.), 2017, at p. 145, fn 5.

[80] Balthasar, S., 'Best Practice in International Arbitration: Comparative Reflections on the UNCITRAL Model Law', in Balthasar, S., (ed.), *International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis*, Nomos, 2016, at p. 3.

[81] Rajoo, S., *Law, Practice and Procedure of Arbitration*, (2nd edn), LexisNexis, 2017, at p. 5.

[82] More on multi-tiered dispute clauses see Zakaria, *Arbitration in Malaysia: A Practical Guide*, above note 44, at pp. 108-109.

[83] Balthasar, *Best Practice in International Arbitration: Comparative Reflections on the UNCITRAL Model Law*, above note 80, at p. 6.

Arbitration should not be seen as an enemy to local courts. The two reinforce each other with arbitration viewed as a mechanism to help remove delays and other impediments to settlements of commercial disputes. As Rajoo opined, "as national courts clear case backlogs, and set up special courts to determine commercial disputes, for example the Singapore International Commercial Court, the advantages of speed that arbitration once possessed will diminish". Arbitration will, however, be maintained so long as "commercial community retains its inclination towards arbitration over courts".[84] Accordingly, "in the 21st century, the courts are seen as powerful allies of arbitration rather than as jealous controllers of its power. This relationship plays an important role in facilitating international trade, foreign investment and economic development".[85]

5. REFLECTIONS ON TANZANIA AS A SEAT OF ARBITRATION

Tanzania's position on international arbitrations in the natural resources sector partly reflects the growing concern over the effectiveness of arbitration as a sensible and cost-effective alternate dispute resolution mechanism and the need to protect national interests. As pointed out above there are growing allegations and frustrations against international arbitration which justify adoption of necessary laws governing international arbitration, especially in key strategic and sensitive economy sector, without negatively affecting the existing international commitments.

Since investments are done in accordance with national laws, it is logical that governing laws be the laws of the land and the seat of arbitration be in the country. Undoubtedly, international arbitration as one of the foreign investors' preferred mode of dispute

---

[84] Rajoo, S., *Law, Practice and Procedure of Arbitration*, above note 81, at p. 5.
[85] Id, at p. 7.

settlement continues to be available in the natural wealth and resources sector in Tanzania. Undoubtedly, the advantages of international arbitration in promoting foreign investments in a country cannot be gainsaid. As William Park and Alexander Yanos put it:

> in a world lacking any neutral supranational courts of mandatory jurisdiction to decide cases or enforce foreign judgments, arbitration bolsters cross-border economic cooperation by enhancing confidence within the business community that commercial commitments will be respected.[86]

In such a tense atmosphere, arbitral institutions will play a key role in rebuilding trust in Investor-State arbitration. Considerable effort has been made in making Tanzania a preferred and safe seat of arbitration in line with the London principles for a safe seat.[87] The framework is already in place. Tanzania national courts' practice is supportive, proactive and an ally of arbitration, making Tanzania one of African jurisdictions with active arbitration practitioners.[88] Arbitration institutions in the country include the Tanzania Institute of Arbitrators (TIA), the East African Court of Justice (Arbitration Institution) and the National Construction Council. The Arbitration Act also establishes a Tanzania Arbitration Centre, to act also as a regulator of arbitration practice in the country.[89] There is therefore no shortage of professionals including the chartered arbitrators and key resources to support the seat of international arbitration.

---

[86] Park, W.W. and Yanos, A., 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration', 58 *Hastings Law Review*, 2006, at p. 251.

[87] 'CIArb London Centenary Principles: A Framework for Evaluating the Best Arbitral Seats', available at www.ciarb.org>, (accessed 30 November 2019).

[88] Onyema, E., *et al*., 'SOAS Arbitration in Africa Survey, Domestic and International Arbitration: Perspectives from African Arbitration Practitioners', SOAS University of London, 26 April 2018, at p. 7, available at <http://eprints.soas.ac.uk/25 741/> (accessed 15 May 2018).

[89] S. 77 of the Arbitration Act 2020.

The Arbitration Act also provides for immunity to arbitrators “for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is proven to have been done in bad faith or professional negligence.”[90]

Furthermore, the New York Convention entered into force in Tanzania on 11 January 1965. Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992 and to the Multilateral Investment Guarantee Agency of 1985 since 19 June 1992.[91] As indicated above, provisions of the Arbitration Act are in line with the international best practices common in arbitration pieces of legislation across the world, with limited grounds for challenging an award. This will enhance the finality of awards made in Tanzania as a seat of arbitration.

The country’s fight against corruption has a potential of enhancing the credibility of awards made at its seat under the guidance of the existing reformed judiciary. The existence of friendly visa requirements, modern facilities and good logistical support including IT and hotels, well connected international airports and safety records, make Tanzania a preferred choice for international arbitration.

---

[90] S. 31 of the Arbitration Act 2020.

[91] Kapinga, W., *et al*, ‘Tanzania’, in Wegen, G. and Wislke, S. (eds.), *Arbitration in 47 Jurisdictions Worldwide: Getting the Deal Through*, Global Arbitration Review, 2009, available at <https://www.mkono.com/pdf/Tanzania%2018.pdf> (accessed 15 May 2018). Also see Gastorn, *Examination of Arbitration Related UNCITRAL Texts and Their Adoption by African States*, above note at 49, at p. 2. ICSID cases involving Tanzania includes *Standard Chartered Bank (Limited) Honk Kong v. United Republic of Tanzania* (ARB/15/41); *Chartered Bank (Honk Kong) Limited v. United Republic of Tanzania* (ARB/10/20); *Standard Chartered Bank v. United Republic of Tanzania* (ARB/10/12); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ARB/05/22) and *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ARB/98/8) (2010).

6. CONCLUDING REMARKS

With a flourishing body of case-law supporting the provisions of the Arbitration Act as is available in the common law system, it would be safe to conclude that the Arbitration Act lays down well tested mechanisms to resolve any ambiguities or challenges to interpretation. The primary duty of ensuring that the general principles enshrined in section 3 of the Arbitration Act would lie with the supervising courts that have been empowered with necessary discretion in key areas. It would be their actions that will have a profound impact how arbitration in Tanzania is viewed by foreign investors and it would be their decisions that would have to comply with the international obligations of Tanzania.

The role for future legislative intervention cannot be ruled out. Such intervention could play a key role in resolving conflicts and ironing out creases enhancing certainty and expediency of the arbitration procedure. As alluded to above, it is equally true that international arbitrations, especially on investment claims, have subjected developing States' economies and wellbeing of their population to a fiasco and catastrophic repercussions.

The Tanzania Arbitration Centre is a first step towards providing investors an option of a body of independent arbitrators that have the experience in a variety of subject matters including international commercial arbitration. A higher degree of compliance with timelines as standards in the arbitral awards will ultimately reduce the scope for challenges in the courts, and will lay the foundation for increased arbitration in Tanzania.

In all, the Arbitration Act is a valuable addition to the various models of arbitration pieces of legislation currently in force as it provides certainty and clarity to arbitration procedure in Tanzania. It promotes the speedy resolution of foreign investment disputes by

arbitration in Tanzania. It is likely to win the confidence of international investors by protecting their investments and business interests through abiding by the rule-based arbitration system.